ARK LAND CO.

IBLA 92-271 Decided April 13, 1995

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, waiving condition of continued operation under Federal coal lease and denying in part request for refund of advance royalties. WYW-054737.

Affirmed in part, reversed in part, and remanded.

1. Coal Leases and Permits: Continued Operation--Coal Leases and Permits: Royalties

A force majeure exception to the requirement of continued operation of coal leases under section 7(b) of the MLA to maintain production in commercial quantities is properly recognized when operations under the lease are interrupted by a landslide within the pit which causes operations to be barred as unsafe. When the lease is subsequently found to be mined out on the ground that remaining coal reserves are not recoverable, a decision to deny a refund of advance royalties tendered for periods subsequent to the events which barred mining will be reversed.

APPEARANCES: Blair M. Gardner, Esq., Arch Mineral Corporation, St. Louis, Missouri, for the Ark Land Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Ark Land Company (Ark) has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated January 28, 1992, waiving the condition of continued operation under Federal coal lease WYW-054737 and denying in part its request for refund of advance royalties paid with respect to the lease.

The facts are substantially undisputed. Federal coal lease WYW-054737 was originally issued effective November 1, 1961, to Ark's predecessor-in-interest, pursuant to section 2 of the Mineral Leasing Act of 1920 (MLA), 41 Stat. 438 (current version codified at 30 U.S.C. § 201 (1988)). 1/

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1/ The lease covers 320 acres of land situated in sec. 12, T. 22 N., R. 82 W., sixth principal meridian, Carbon County, Wyoming, in the "Hanna

The lease terms were subsequently readjusted effective September 1, 1982, thereby incorporating the diligent development and continued operation requirements of section 7(b) of the MLA, as amended, 30 U.S.C. § 207(b) (1988) (as added by section 6 of the Federal Coal Leasing Amendments Act of 1976, P.L. 94-377, 90 Stat. 1087). See 43 CFR 3483.1(a) and (b)(2); Atlantic Richfield Co., 112 IBLA 115, 117 (1989). Accordingly, Ark was required to achieve diligent development of the leased land within 10 years of September 1, 1982, by producing commercial quantities of coal, i.e., 1 percent of recoverable coal reserves, 2/ and then (except where operations are interrupted by casualties not attributable to the lessee, i.e., in the event of force majeure) to continue such operations every year thereafter. 3/ See 30 U.S.C. § 207(b) (1988); 43 CFR 3480.0-5(a)(6), (8), (9), (12), and (13), and 3483.1(a); Western Slope Carbon, Inc., 98 IBLA 198, 201 (1987). The requirement to continue operations (following achievement of diligent development) may be suspended in lieu of the payment of advance royalty, in an amount equivalent to the royalty that would be owed on the production of one percent of recoverable coal reserves. See 30 U.S.C. § 207(b) (1988); 43 CFR 3480.0-5(a)(1), 3483.1(a)(2), 3483.3(a)(2), and 3483.4; Western Slope Carbon, Inc., supra at 201.

Ark satisfied the diligent development requirements in September 1982, thereby becoming obligated to either continue the production of commercial quantities of coal or pay advance royalties in lieu of continued production with respect to each COY thereafter. 4/ Mining operations were conducted on the leased land from October 1982 until November 1986, when a slide

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fn. 1 (continued)
Basin." It was assigned to Ark, with BLM's approval, effective Jan. 1, 1971.

2/ Recoverable coal reserves are those coal reserves within the leased land that are commercially minable. See 43 CFR 3480.0-5(a)(5), (23), and (32); Atlantic Richfield Co., supra at 118-19.

3/ The leased land is part of Ark's Seminoe II Mine, which is a surface coal mining operation in southeastern Wyoming. Operations were conducted by Arch of Wyoming (Arch), which (along with Ark) is a wholly owned subsidiary of the Arch Mineral Corporation. See Statement of Reasons for Appeal (SOR) at 1 n.1. BLM had originally determined that, as of Sept. 1, 1982, 545,375 tons of recoverable coal reserves remained on the land. See Decision at 1. Thus, 5,453 tons were required to be produced each continued operation year (COY), or an average of 5,453 tons per COY (computed on a 3-year basis). See 43 CFR 3480.0-5(a)(8).

4/ Each COY in this case runs from October 1 to September 30 of the succeeding year, i.e., the "12-month period beginning with the commencement of the first royalty reporting period following the date that diligent development was achieved [in September 1982] and each 12-month period thereafter." 43 CFR 3480.0-5(a)(9). See Western Slope Carbon, Inc., supra at 199. Thus, the first COY (COY 1) ran from Oct. 1, 1982, to Sept. 30, 1983.

occurred in the pit causing operations to be halted. Ark complied with the requirement of continued operation by producing coal in commercial quantities from the leased land each COY after September 1982, through the COY ending September 30, 1987.

In a letter dated January 21, 1987, Ark notified BLM that a slide had occurred "which rendered the remaining portion of the coal on the lease unrecoverable," and that it was prohibited by the Mine Safety and Health Administration (MSHA), U.S. Department of Labor, from entering the area of the slide. The slide occurred in the area of the "Block 3 [P]it" in November 1986, thus blocking the recovery of the approximately 160,000 tons of coal remaining on the land. 5/ See Memorandum to State Director from Associate District Manager, dated Feb. 16, 1988, at 1. Hence, Ark stated that it considered the lease to have been "mined out" due to the lack of recoverable coal reserves on the leased land (Letter to BLM, dated Jan. 21, 1987, at 2).

MSHA had inspected the mine site on November 24, 1986. As a result, it had issued a "Section 107a" imminent danger order (No. 2831861) (SOR at 1). See Letter to BLM from MSHA, dated June 29, 1989, at 1. 6/ The order stated that a significant opening or crack, from 1/2 inch to 30 inches in width and from 1 inch to 5-1/2 feet deep, had appeared atop the highwall of the Block 3 Pit and that the highwall face showed signs of sloughing and deterioration. See Mine Citation/Order, dated Nov. 24, 1986. The order noted that the operator had ceased all mining operations, barricading the access ramps. See id. The effect of the order was to prohibit Ark from conducting mining operations on the leased land, until a plan could be devised for the safe removal of coal. See Letter to BLM from MSHA, dated June 29, 1989, at 1.

On January 6, 1988, Ark requested BLM to suspend its further compliance with the requirement of continued operation because of force majeure, referring to its inability to mine any more of the otherwise recoverable coal reserves due to the slide and the absence of MSHA's approval of continued mining operations. See Letter to BLM, dated Jan. 5, 1988, at 2-3. It asked BLM to invoke force majeure, starting with the COY beginning October 1, 1987, and continuing until Ark was again authorized by MSHA to engage in mining operations. See id. at 3.

5/ Ark also noted that, other than the Block 3 Pit, there was another small area of coal remaining on the lease, but that this area could not be mined economically. See Letter to BLM, dated Jan. 21, 1987, at 1-2.

6/ The order was issued pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 817(a) (1988). That provision authorizes MSHA to issue an order requiring a mine operator to cause all persons to be withdrawn from an area in which an "imminent danger" is found, by inspection, to exist. 30 U.S.C. § 817(a) (1988). The withdrawal and prohibition from re-entry shall continue "until [MSHA] * * * determines that such imminent danger and the conditions * * * which caused such imminent danger no longer exist." Id.

BLM confirmed that the slide had occurred and that further mining operations were unsafe and could not proceed in the absence of MSHA's approval. 7/ See Memorandum to State Director from Associate District Manager, dated Feb. 16, 1988, at 1, 2. By decision dated March 2, 1988, BLM granted a force majeure suspension (effective October 1, 1987) suspending the requirement of continued operation (and payment of advance royalty in lieu of operation) until April 30, 1988, or 45 days after action by MSHA to accept or reject Ark's revised mine plan (whichever was earlier). BLM subsequently extended the suspension by decision dated August 31, 1988, until October 31, 1988, or 45 days after action by MSHA to accept or reject Ark's revised mine plan (whichever was earlier). Subsequently, by notice dated May 9, 1989, BLM held the suspension to be terminated effective October 31, 1988, in the absence of any evidence of the submission of a revised mine plan to MSHA or a request for extension of the suspension. 8/

In a letter filed on May 23, 1989, Ark sought to relinquish all of the remaining coal on the leased land, thus partially relinquishing its lease to the extent that it permitted the extraction of coal. 9/ Thereafter, Ark requested BLM, in a letter filed on May 30, 1989, to find that all recoverable coal reserves had been mined from the lease effective October 31, 1988, on the ground that the force majeure suspension was effective on that date and no mining had occurred since that time. Alternatively, Ark requested that BLM accept advance royalty payments retroactive to November 1, 1988. 10/

7/ BLM noted: "During November of 1986, a massive block of in[-]place rock broke loose * * * along a previously undetected fracture or minor fault. Even though movement was only a matter of feet, a potential for further movement into the operating pit created a situation too hazardous to risk either men or equipment with continued operations" (Memorandum to State Director from Associate District Manager, dated Feb. 16, 1988, at 1).

8/ The first COY following termination of the suspension (COY 6) ran from Oct. 1, 1988, to Sept. 30, 1989. BLM took this COY and considered it with the two prior COY's (Oct. 1, 1985, to Sept. 30, 1986 (COY 4), and Oct. 1, 1986, to Sept. 30, 1987 (COY 5)). See 43 CFR 3480.0-5(a)(8). Because the total actual production over this 3-year period (15,150 tons) was less than the total required production for purposes of compliance with the requirement of continued operation for this same period (16,359 tons), BLM determined that Ark owed advance royalty on the difference (1,209 tons). See Enclosure 1 attached to Letter to Ark from Acting District Manager, dated Sept. 19, 1989. However, due to the fact that the suspension covered part of the third COY, Ark's obligation to pay advance royalty was proportionately reduced. See Letter to Ark from District Manager, Rawlins District, Wyoming, BLM, dated Oct. 11, 1989, at 1.

9/ Relinquishment of the lease altogether was apparently precluded by the need to complete reclamation operations.

10/ Ark was concerned about the statutory prohibition on issuance of other mineral leases to it where it was not producing coal from the subject lease

By letter dated June 29, 1989, MSHA notified BLM that no plan for removing the remaining coal from the Block 3 Pit had been formally submitted by Ark. In an August 7, 1989, decision, BLM denied Ark's request for partial relinquishment of the subject lease as not being in the public interest in the absence of a final determination that it was not feasible to mine the remaining coal in the pit (estimated at 163,471 tons). However, it agreed to accept advance royalties for the period since November 1, 1988. On August 30, 1989, Ark tendered payment of all of the advance royalty due with respect to the period from November 1, 1988, to September 30, 1989 (thus covering the COY from October 1, 1988, to September 30, 1989). See Letter to Minerals Management Service from Arch, dated Aug. 30, 1989; SOR at 3. It appears that Ark also subsequently paid advance royalties for the COY's beginning October 1, 1989, 1990, and 1991. See SOR at 3.

Another inspection by MSHA of the Block 3 Pit on September 13, 1990, determined that safe mining operations could not be conducted on the leased land due to fires, subsidence, and the generally unstable condition of the highwall and other areas. See SOR at 3. This determination was set forth in an October 5, 1990, letter to Arch from MSHA, a copy of which was provided to BLM on January 25, 1991.

On November 2, 1990, Ark again sought to relinquish development rights on the subject lease. Ark contended that, since MSHA had recently notified it that it would not allow continued mining in the Block 3 Pit due to safety considerations, there were no more recoverable coal reserves on the leased land (Letter to BLM, dated Oct. 26, 1990).

By letter dated October 1, 1991, noting that MSHA had prohibited further mining operations in its October 5, 1990, letter, Arch requested BLM to waive the requirement of continued operation under the subject lease since the coal was mined out. Arch also noted that Ark would be requesting a refund of any advance royalties paid since October 1986, when production last occurred. Subsequently, Ark informed BLM on November 4, 1991, that it would be requesting a refund of advance royalty paid for the COY beginning October 1, 1991, and "previous payments since the date production ended" (Letter, dated Oct. 28, 1991).

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fn. 10 (continued)
in commercial quantities. See 30 U.S.C. § 201(a)(2)(A) (1988); 43 CFR 3472.1-2(e); Atlantic Richfield Co., supra at 117. Excepted from the prohibition, however, are those lessees who are paying advance royalty in lieu of continued production, in accordance with 30 U.S.C. § 207(b) (1988). See 30 U.S.C. § 201(a)(2)(A) (1988); 43 CFR 3472.1-2(e)(1)(i); Solicitor's Opinion, 92 I.D. 537, 547-48 (1985). Also excepted are those lessees whose lease has been mined out, i.e., where all recoverable coal reserves have been exhausted. See 43 CFR 3472.1-2(e)(1)(i), and (e)(5). Ark sought to qualify under one of these exceptions.

In the decision under appeal BLM concluded, on the basis of the September 1990 MSHA inspection, that the leased land had been effectively mined out because the remaining coal could not be safely removed, as of September 13, 1990 (Decision at 1). Hence, BLM waived the condition of continued operation under the lease as of that date. Further, BLM treated Arch's October 1991 letter as a request for a refund of any advance royalties paid "since October 1986," and held that Ark was entitled to a credit of advance royalties paid only since September 13, 1990 (Decision at 2). It, thus, denied the request for a refund of advance royalties paid from October 1986 to September 13, 1990. Ark has appealed from this BLM decision.

In its SOR, appellant contends that the subject lease was effectively mined out since November 24, 1986, when MSHA issued the order barring mining operations on safety grounds. Appellant asserts that its inability to safely remove coal from the Block 3 Pit had remained unchanged throughout the intervening time period. Thus, appellant argues that it is entitled to a refund or credit not only of advance royalties paid from September 13, 1990 (as BLM held in its decision), but also of all advance royalties paid from November 24, 1986, to September 13, 1990. 11/ In these circumstances, appellant concludes that BLM's refusal to authorize a refund or credit is arbitrary and capricious.

As a preliminary matter, we note that, in relieving appellant of the requirement of continued operation as of September 13, 1990, BLM invoked the "Waiver of Conditions" section of the lease (Decision at 2). Although the lease, as readjusted effective September 1, 1982, contains a provision at section 22 entitled "Waiver of Conditions," which recognizes the right of BLM to waive a breach of conditions in the lease, this is expressly limited to conditions not required by statute. The requirement of continued operation once diligent development is achieved is found in section 7(b) of the MLA. See 30 U.S.C. § 207(b) (1988). Therefore, BLM is not permitted to waive a breach of that condition. However, the record before us does not establish a breach occurred. At the time of the January 1992 BLM decision, the record indicates that appellant had paid all of the advance royalties with respect to the COY's, thus satisfying the requirement of continued operation. Hence, there was no need to waive a breach of this requirement under the lease.

[1] Nevertheless, section 7(b) of the MLA does recognize an exception to the requirement of continued operation when "operations under the

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11/ According to appellant, these royalties encompass those paid with respect to the COY's beginning Oct. 1, 1988, and 1989. Appellant notes that the royalty due for the COY prior to that beginning Oct. 1, 1988, was not paid because BLM had justifiably invoked force majeure, suspending the requirement of continued operation retroactive to Oct. 1, 1987.

lease are interrupted by strikes, the elements, or casualties not attributable to the lessee." 30 U.S.C. § 207(b) (1988) (emphasis added); see 43 CFR 3483.3(a)(1); 47 FR 33172 (July 30, 1982) ("[T]here is no condition of continued operation in such situations"). Thus, the requirement of continued operation may be deemed suspended when operations were prevented by force majeure. See 47 FR 33172 (July 30, 1982); Alfred G. Hoyl, 123 IBLA 169, 186-87, 99 I.D. 87, 96 (1992). This is what BLM did in March and August of 1988.

However, it appears that BLM, in its January 1992 decision, found that it could also relieve appellant of "further compliance" with the requirement of continued operation on the ground that the lease was mined out (Decision at 2). This finding was based on the conclusion of the MSHA inspectors that there is no safe way to extract the remaining coal reserves. This Board has previously held that the determination of recoverable coal reserves on a lease is a dynamic rather than a static process and is subject to adjustment as new information becomes available. Atlantic Richfield Co., 112 IBLA at 121; see 43 CFR 3482.2(a)(3) and (c)(2). This is essentially what BLM did. By declaring the lease mined out, following the recovery of 381,904 tons of coal, BLM effectively concluded that the original recoverable coal reserves actually numbered 381,904 tons. See Decision at 1. This analysis has support in the regulations which provide in pertinent part that: "Leases that have been mined out (i.e., all recoverable reserves have been exhausted), as determined by the authorized officer, may be held for such purposes as reclamation without disqualification [for failure to comply with the diligent development operations]." 43 CFR 3472.1-2(e)(5). Thus, following the recovery of that coal, the requirement of continued operation had been fully satisfied. Further, in the absence of any recoverable coal reserves, by definition, "continued operation," which is the "production of * * * recoverable coal reserves" (43 CFR 3480.0-5(a)(8)), cannot occur, and thus must be held to be no longer required. Cf. 43 CFR 3472.1-2(e)(5) and (e)(6)(ii) (Lessee relieved of obligation under 30 U.S.C. § 201(a)(2)(A) (1988) to produce commercial quantities of coal where lease mined out). 12/ It follows that, if the requirement of continued operation is fully satisfied and thus no longer in force, no advance royalty need be paid in lieu of continued production, and any royalty paid is subject to a request for refund or credit. Indeed, there would be no requirement of continued operation which could even be suspended in lieu of the payment of advance

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12/ The regulations clearly relieve the holder of a coal lease that has been mined-out from the requirement to produce commercial quantities of coal (or pay advance royalty in lieu of continued production), for purposes of retaining its qualification to hold other mineral leases under 30 U.S.C. § 201(a)(2)(A) (1988). See 43 CFR 3472.1-2(e)(1)(i), (e)(5) and (e)(6)(ii). In the absence of recoverable coal reserves, we find that the lessee is also discharged of the requirement to maintain continued operations (or pay advance royalty in lieu of continued production).

royalty. See 47 FR 33172 (July 30, 1982) ("[L]essee is under no obligation to pay advance royalty [when] the condition of continued operation is not in force").

The question for decision here though is the point in time that appellant should be considered to have fully satisfied the requirement of continued operation. BLM held that this occurred only as of September 13, 1990. Appellant argues that it had been achieved by November 24, 1986. We find the record supports appellant's position.

At all relevant times, the remaining recoverable coal reserves on the land leased to appellant under lease WYW-054737 were situated in the Block 3 Pit. See Decision at 1. Further, it is clear that MSHA determined, during the course of its November 1986 inspection, that safe mining operations could not be conducted at this location due to the presence of sloughing and deterioration of the highwall. There is no evidence that mining operations have ever taken place since that time. BLM recognized in October 1991 that the lease had "last produced in October, 1986," just prior to the disastrous slide that precluded mining operations in the Block 3 Pit the following month (Memorandum to State Director from District Manager, dated Oct. 22, 1991, at 1). Nor is there any evidence that conditions in the mine changed at any time since November 1986. These conditions were recognized by BLM on March 2, and August 31, 1988, when it suspended the requirement of continued operation due to force majeure. Further, MSHA's determination that mining operations could not be safely conducted was later confirmed during the course of its September 1990 inspection. All that transpired between the November 1986 and September 1990 MSHA inspections was an effort by appellant, apparently with the aid of MSHA, to find some way to safely reenter the Block 3 Pit for the purpose of recovering the remaining coal. That effort proved unavailing. In any event, the coal was no more subject to safe removal just prior to the September 1990 inspection than it had been at any time since the November 1986 inspection. Moreover, we must conclude that the remaining coal could not be considered "recoverable" in the sense that mining was "permissible" either in September 1990 or at any time since November 1986. See 43 CFR 3480.0-5(a)(5), (23), and (32); 47 FR 33160 (July 30, 1982) (Recoverable coal reserves do not include "coal which is not recoverable due to legal or regulatory constraints"); Atlantic Richfield Co., supra at 118-19, 125-26. MSHA's outstanding Section 107a order prevented appellant, by operation of law, from entering the Block 3 Pit for mining purposes at any time after November 24, 1986. See 30 U.S.C. § 817(a) (1988).

Nevertheless, BLM concluded that the leased land was "effectively mined-out" in the absence of any more recoverable coal reserves only as of the September 1990 MSHA inspection (Decision at 1). Thus, it implicitly concluded that the land was not "effectively mined-out" as of the November 1986 inspection and thereafter, even though it had long been aware that the mining of the remaining coal was physically prevented by

the hazardous conditions in the Block 3 Pit, as first detected by MSHA in November 1986. See Letter to BLM from Ark, dated Jan. 5, 1988, at 2; Memorandum to State Director from Associate District Manager, dated Feb. 16, 1988; Letter to BLM from MSHA, dated June 29, 1989. We can find no justification in the record for this distinction.

BLM suspended the requirement of continued operation between October 1, 1987, and October 31, 1988, precisely in recognition of the inability to safely recover coal during that time period. Nothing changed after October 31, 1988. BLM knew this to be the case when it received a copy of the October 5, 1990, letter to Arch from MSHA on January 25, 1991. That letter stated that it had been determined, following the September 1990 inspection, that "the plan to begin the mining of the Block 3 [P]it, which had been idle since November 1986, should not be implemented * * * [because] a safe method to recover the coal remaining in the * * * pit does not exist" (Letter to Arch from MSHA, dated Oct. 5, 1990, at 1-2, emphasis added). Moreover, there is no evidence in the record to indicate that BLM had any reason to believe that the conditions which had precluded mining in November 1986 had not continued throughout the time period up to September 1990. Accordingly, we find that BLM failed to provide a viable basis
for its decision declining to refund advance royalty paid subsequent to November 1986 and prior to September 1990.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part, and the case is remanded.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge